IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 671 of 2004
With
CRIMINAL APPEAL No. 530 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA
HONOURABLE MR.JUSTICE K.A.PUJ

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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VASUMAL TAKCHAND SINDHI LOHANA - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR HRIDAY BUCH for Appellant in both appeals
MR KP RAVAL ADDL.PUBLIC PROSECUTOR for RESPONDENT – State of Gujarat

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 07/10/2006

COMMON ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.M.KAPADIA)

1. These two Criminal Appeals under Section 374 of the Code of Criminal Procedure ('the Code' for short) are directed against judgment and order dated 26.3.2004 rendered in Sessions Case No. 31 of 1999 (Old Sessions Case No. 74 of 1990) by the learned Additional Sessions Judge & 4th Fast Track Court, Veraval, District Junagadh, by which the appellant of Criminal Appeal No.671 of 2004 ('A-2' for short) has been convicted for the offences punishable under Sections 304 Part II, 328 and 326 of Indian Penal Code ('IPC' for short) and also under Sections 65 (e) and 66 (1) (b) of the Bombay Prohibition Act, 1949 ('the Prohibition Act' for short) and sentenced to suffer RI for 10 years and fine of Rs.6,000/- i.d., RI for 1 year for the offence punishable under Section 304 Part II of IPC, RI for 7 years and fine of Rs.5,000/- i.d., RI for 6 months for the offence punishable under Section 328 of IPC and RI for 7 years and fine of Rs.5,000/- i.e., RI for 6 months for the offence punishable under Section 326 of IPC and

SI for 3 years and fine of Rs.5,000/- i.d., SI for 6 months for the offence punishable under Section 65 (e) of the Prohibition Act and SI for 6 months and fine of Rs.1,000/- i.e., SI for 1 month for the offence punishable under Section 66 (1) (b) of the Prohibition Act whereas appellant of Criminal Appeal No.530 of 2004 ('A-8' for short) has been convicted for commission of the offence punishable under Sections 65 (e) and 66 (1) (b) of the Prohibition Act and sentenced to suffer SI for 3 years and fine of Rs.5,000/- i.d., SI for 6 months for commission of offence punishable under Section 65 (e) of the Prohibition Act and SI for 6 months and fine of Rs.1,000/- i.d., SI for 1 month for commission of the offence punishable under Section 66 (1) (b) of the Prohibition Act. The trial court has ordered that all the substantive sentences imposed on A-2 and A-8 shall run concurrently.

2. These two appeals arise out of a phase of sporadic incidents which have taken place on 19.3.1990 at Sutarpada situated at Sea-shore,

Taluka Veraval, District Junagadh, popularly known as “liquor tragedy” in which certain persons died and others received injuries due to consumption of liquor adulterated with methyl alcohol. The complainant, Amarsinhbhai Harjivanbhai Bhangi, P.W.1, informed B.G. Bharwad, Police Inspector, Sutarpada Police Station, at Veraval Civil Hospital that he was informed by Koli Virabhai Arjanbhai, at about 11.00 P.M., on 18.3.1990 that several persons, including Bhikhabhai Hamirbhai, Bachubhai Gor, etc., who had consumed liquor manufactured by deceased A-1, Pala Dasa Koli, suddenly fell sick and were to be taken to the hospital and during treatment, Bachubhai Gor died and manufacturer of the liquor, i.e., A-1, Pala Dasa Koli also died in the hospital. Accordingly, the FIR came to be lodged in respect of the offences punishable under Sections 304 Part I, 328, 326, 201 and 34 of the IPC and Sections 65 (e), 67 (1) and 66 (a)(b)(c) of the Prohibition Act in which 20 persons lost their life and 3 persons suffered grievous injuries.

3. A complaint for the aforesaid incident was filed by P.W.1, Amarsinh Harjivanbhai Bhangi, which was registered vide CR No.16/90 at Sutarpada Police Station. Pursuant to the registration of the complaint, PSI, BG Bharwad, Sutarpada Police Station, started investigation. During the course of investigation, many victims who suffered injuries in their stomach became serious and brought to the hospital for treatment. Therefore, District Superintendent of Police, Junagadh handed over the investigation to Satish Sharma, ACP of Mangrol. On receiving the aforesaid instruction, Satish Sharma held camp at Veraval and started investigation. The investigation conducted by him revealed that 20 persons lost their lives and three persons suffered serious injuries because of consumption of liquor adulterated with methyl alcohol manufactured and sold by the accused persons. He, therefore, booked 12 accused persons against whom incriminating evidence for manufacturing and selling liquor adulterated with methyl alcohol

was found.

4. During the course of investigation the dying declarations of the victims who succumbed to the injuries were recorded through Executive Magistrates and the statements of the doctors who treated the victims were also recorded. The dead bodies of the victims were sent for autopsy and after receiving the autopsy reports it was found that the cause of death was consumption of liquor adulterated with methyl alcohol. During the course of further investigation it was also revealed that the accused had manufactured and sold the said liquor to the victims. Satish Sharma, ACP, therefore, arrested the accused persons and filed charge-sheet against them in the Court of learned JMFC, Veraval for the offences punishable under Sections 304 -I, 328, 326, 201 and 34 of IPC and under Sections 67 (1) and 67 (a) (b) and (c) of the Prohibition Act.

5. As the offence punishable under Section 304 Part I of IPC is exclusively triable by the Court

of Sessions, the learned JMFC, Veraval committed the case to the Court of learned Additional Sessions Judge, Veraval.

6. The learned Additional Sessions Judge, 4th Fast Track Court, Veraval to whom the case was made over for trial, framed charge against the surviving 8 accused as A-1, A-4, A-7 and A-10 died either prior to filing of the charge sheet or after filing of the charge sheet. The accused pleaded not guilty to the charge and claimed to be tried and, therefore, they were put to trial by the learned Additional Sessions Judge and 4th Fast Track Court, Veraval, in Sessions Case No. 31 of 1999 (Old Sessions Case No. 74/1990).

7. To prove the culpability of the accused, the prosecution has examined as many as 138 witnesses and relied upon their oral testimonies. So far as the relevant witnesses for the purpose of deciding these appeals are concerned, they are as under:

PW No	Name of witness	Status	Exh No
1	Amarsinh Harjivanbhai Bhangi	Complainant	761
134	B.G. Bharwad	Police Sub-Inspector	772
128	Gajanan V. Patekar	Police Station Officer	721
	Vira Arjan	Injured	27
27	Kala Hamir	Injured	79
51	Bachu Jiva	Injured	103
113	Dr. P.M. Sonariya	Medical Officer	266
114	Dr. RM Meghnathi	Medical Officer	353
115	Dr. RD Movaliya	Medical Officer	266
116	Dr.KR Hariyali	Medical Officer	475
117	Dr.DK Fulbariya	Medical Officer	495
120	Dr.HD Nimbarkar	Medical Officer	567
122	Dr.RD Jobanputra	Medical Officer	646
136	Dr. Dipak C. Mehta	Medical Officer	908
110	HH Pasaliya	Executive Magistrate	179
111	D.R. Tank	Executive Magistrate	218
112	NM Raichura	Executive Magistrate	244
123	Bhikhubhai Laxmanbhai	ASI	648
124	JJ Jadeja	Police Sub Inspector	650

PW No	Name of witness	Status	Exh No
125	Jethabhai Punjabhai	Police Constable	695
126	Arjunsinh N. Baraiya	ASI	696
129	KB Zala	PSI	721
130	VG Rasaval	PSI	735
131	BD Waghela	PSI	737
132	Waghela	Dy S.P.	743
133	SC Vyas	PSI	762
135	Satish Sharma	ACP	788
138	I.D. Upadhyay	P.I.	931

8. To prove the charge levelled against the accused, the prosecution has also produced a number of documents and relied upon the contents thereof.

9. After recording of the evidence of the prosecution witnesses was over, the trial court explained to the accused the circumstances appearing against them in the evidence of the prosecution witnesses and recorded their further statement under Section 313 of the Code. In their further statement they stated that they have neither manufactured nor sold the liquor adulterated with methyl alcohol nor they had

knowledge that after consuming the liquor the person who consumed the liquor would die and accordingly they denied having committed any offence.

10. On appreciation, evaluation, analysis and scrutiny of the evidence on record, the trial court held that the prosecution has established the complicity of A-2 and A-8 but has failed to establish the charge against the rest of the accused. It has been held by the trial court that A-2 sold adulterated liquor containing methyl alcohol which was consumed by some of the accused as well as other victims and he had the knowledge that after consuming the adulterated liquor the persons who consumed the liquor would die and, therefore, he has committed the offences punishable under Sections 304 Part II, 328 and 326 of the IPC as well as Sections 65 (e) and 66 (1) (b) of the Prohibition Act and imposed various sentences for commission of the said offences to which reference is made in earlier

paragraph of this judgment.

So far as A-8 is concerned, the trial court held that in his possession 12 litres of adulterated liquor containing methyl alcohol was found which was meant for selling and hence he has committed offence punishable under Sections 65 (e) and 66 (1) (b) of the Prohibition Act and imposed various sentences on him for commission of the said offences to which also reference is made in earlier paragraph of this judgment.

It has been further ordered that the sentences imposed on the respective accused shall run concurrently.

It is this judgment and order which is on the anvil of scrutiny of this Court in two separate appeals at the instance of A-2 and A-8.

11. Mr. Hriday Buch, learned advocate of A-2 and

A-8 has made his submissions elaborately. He submitted that there is no evidence to establish the nexus between the incident in question and the A-2. It is also submitted by him that A-2 was not having knowledge that the liquor sold by him contained methyl alcohol and, according to him, for the purpose of convicting the accused under Section 304 Part II, 328 and 326 of the IPC, there must be knowledge on the part of the accused who sold the liquor that by consuming the liquor the person who consumes it would either receive serious injuries or die. Therefore, there was no mens rea on the part of A-2. It is also highlighted by him that the prosecution has failed to establish as to who manufactured the adulterated liquor, which was consumed by the victims. According to him, it is only on the presumption that the aspect of knowledge had been attributed to A-2. According to him, in absence of any connecting evidence as to who manufactured it and that A-2 had knowledge that the liquor was adulterated with methyl alcohol and consumption of the adulterated alcohol would be injuries to

health and it would even cause death and in spite of this knowledge on the part of A-2, he sold it, A-2 cannot be convicted for the offences punishable under Section 304 Part II, 328 and 326 of the IPC. Mr. Buch further submitted that as specific defence was taken by A-2 that the medical evidence raised a doubt as to whether the deceased as well as injured had actually consumed the methyl alcohol. In the said evidence and more particularly in the evidence of P.W.120, Dr. Nimbarkar, Ex.567 it is admitted that apparent symptoms of ethyl or methyl alcohol or any other alcohol are same. P.W.114, Dr. Meghnathi, Ex.353 has admitted that such patients can be treated only by anti-dot medicines. He has also admitted that ethyl alcohol supplied by Police Personnel was not tested before treating the victims. P.W.114, Dr. Meghnathi, Ex.353 has also admitted that such patients cannot be treated only by anti-dot medicines. He has also admitted that the methyl alcohol supplied by the Police Personnel was not tested before treating the victims. According to him, to attract the conviction under

Section 328 of IPC, there must be evidence that the accused administered the liquor to the victims. In instant case, the victims themselves admitted that they had purchased alcohol allegedly from A-2. Therefore, conviction of A-2 for commission of the offence punishable under Section 328 of IPC is unsustainable. The sum and substance of the submissions of Mr. Buch centers around that for attracting offence under Section 304 Part II of IPC it must be proved that the act is done by the accused with the knowledge that it is likely to cause death but without any intention to cause death or to cause such bodily injury as is likely to cause death. In instant case, the element of 'knowledge' on the part of the accused is absent. If there was such knowledge to A-2, deceased A-1, against whom also similar allegation is made, would not have consumed the liquor and would not have died. According to him, at the most, against A-2, the offences under the Prohibition Act can be said to have been proved by the prosecution. Therefore, he urged that the impugned judgment and order of

conviction passed by the trial court, convicting A-2 for commission of offences punishable under Sections 304 Part II, 328 and 326 of IPC cannot be sustained and same may be quashed and set aside by allowing the appeal and acquitting the accused of the offences punishable under the IPC.

So far as the offences punishable under the Prohibition Act is concerned, it is submitted by him that none of the panch witnesses have supported the prosecution case and, therefore, the offences under the Prohibition Act have not been established by the prosecution beyond reasonable doubt and hence the appeal may be allowed by acquitting A-2 of the offences punishable under the Prohibition Act also.

In the alternative he submitted that if this Court comes to the conclusion that the judgment and order of conviction does not call for interference then in that case there are mitigating circumstances in favour of A-2 which would entitle him to imposition of lesser

punishment. A-2 is in jail for the last three years and, therefore, lenient view may be taken so far as sentence is concerned. He, therefore, urged that while maintaining the conviction, this Court may order that the custodial sentence which he had undergone is sufficient and it may be treated as substantive sentence and accordingly order may be passed.

So far as A-8 is concerned, Mr. Buch has submitted that there is no evidence that 12 litres of liquor recovered from the possession of A-8 was for sale and, therefore, offence under section 65 (e) of the Prohibition Act is not made out against him. The prosecution has also failed to establish the charge under section 66 (1) (b) of the Prohibition Act as the panch witnesses have not supported the prosecution case. Therefore according to him, the judgment and order of conviction of A-8 is not sustainable. Therefore, the appeal filed by him deserves to be allowed.

In the alternative he submitted that if this Court comes to the conclusion that the judgment and order of conviction does not deserve to be interfered with then in that case, lenient view may be taken and he may be sentenced to suffer imprisonment for six months for the offences punishable under section 65 (e) as well as 66 (1) (b) of the Prohibition Act. Therefore, the appeal filed by him may also be allowed in part and appropriate order in that regard may be passed.

12. In this connection, Mr. Buch has relied upon the following judgments of the Supreme Court:

(i) Joseph Kurian Philip Jose v. State of Kerala, (1994) 6 SCC 535,

(ii) Keshub Mahindra v. State of M.P. (1996) 6 SCC 129.

13. In counter submission, Mr. KP Raval, learned

Additional PP has submitted that in this liquor tragedy 20 persons lost their life and three persons suffered grievous injuries which has resulted in blindness. According to him, there is voluminous evidence that liquor was adulterated with methyl alcohol and it was prepared by A-2 and he sold it to the remaining accused and the victims who purchased the liquor from A-2 as well as from remaining accused and on consumption of the liquor they have lost their lives and some received serious injuries. There is evidence in the nature of dying declaration who have unequivocally stated before the Executive Magistrates that they purchased liquor from A-2 and consumed it and they received fatal injuries. Therefore, the prosecution has been able to successfully establish that there was knowledge on the part of A-2 that the liquor manufactured by him contained methyl alcohol which is poisonous and the person who consumes the same would die or would receive permanent disability in the nature of grievous injuries and, therefore, the impugned judgment and order of

conviction and sentence does not call for any interference of this Court.

So far as the alternative submission advanced by Mr. Buch is concerned, Mr.Raval has submitted that looking to the mishap, no leniency can be shown to the accused and the sentence imposed upon them commensurate with the gravity of the offence and the same does not call for interference of this court. According to him, there is no substance in both the appeals filed by the accused as the impugned judgment and order of conviction and sentence does not suffer from any infirmity and illegality. He, therefore, urged to dismiss both the appeals.

14. In support of the aforesaid submissions, Mr. Raval, learned APP, has relied upon the following judgment of the Supreme Court:

(i) Tarsem Singh and others v. State of Punjab, (2002) 2 SCC 673.

15. We have considered the submissions advanced by Mr. Hriday Buch, learned advocate of A-2 and A-8 and Mr. KP Raval, learned APP for respondent – State of Gujarat. We have also perused the impugned judgment and order. We have also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case. We have also gone through the judgments relied upon the learned advocates appearing for the parties.

16. As per the prosecution case, A-2 at the relevant time was selling liquor adulterated with methyl alcohol at village Sutarpada. Four victims of this tragedy i.e., Laxman Kala, Babu Vigha, Kalu Hamir and Manda Mala purchased liquor from him. On consuming the liquor some of them died and some of them received grievous injuries.

17. To prove the said aspect, the prosecution has

relied upon the evidence of P.W.111, D.R.Tank, Executive Magistrate, Ex.218 and P.W. 112, NM Raichura, Executive Magistrate, Ex.244 who recorded the dying declarations of deceased persons before whom the deceased persons have stated that they bought the liquor by paying an amount of Rs.2.50 from A-2 ad after consuming it they started feeling uncomfortable and were brought to the hospital at Veraval. So far as injured witnesses are concerned, they have stated that they consumed the liquor sold by A-2 and sustained injuries.

18. On reappreciation, reevaluation, reanalysis and close scrutiny of the evidence on record, according to us, there is no manner of doubt that A-2 sold the liquor containing methyl alcohol, which is poisonous, to the victims and after consuming the same, some of them died and some of them received serious injuries. A-4, Giga Mala, who was an employee of A-2, has died and said Giga Mala had sold liquor to the witness

Manda Mala, who received serious injuries.

19. The contention that the Medical evidence raised doubt as to whether the deceased as well as injured had actually consumed liquor containing methyl alcohol, has no substance. The contention that A-2 had no knowledge that the liquor had contained methyl alcohol, cannot be believed because he had prepared the liquor and hence he had the knowledge that methyl alcohol is a poisonous substance and that the consumption of the liquor adulterated with methyl alcohol would kill the person who consumes it. Therefore, the contention that A-2 cannot be convicted for the offence punishable under Sections 304 Part II, 328 and 326 of IPC, cannot be accepted.

20. In Joseph Kurian's case (supra), in para 11 of the reported decision, the Supreme Court has observed as under:

> “In the present case the trial court observed that it cannot be said that the accused or

any of them knew that arrack mixed with small quantity of methyl alcohol (2.64% as found by the chemical analyst) was likely to cause death or serious bodily injury that is likely to cause death. On this finding applicability of Section 302 or even that of section 304 IPC has been ruled out. This finding on the fact situation is open to doubt. If the finding be correct that the accused did not have guilty knowledge of causing death or of likelihood of causing death or of serious bodily injury likely to cause death, how could the guilty knowledge stop in that slide or grading not coming down to take within its arms hurt also. The act of the accused in adulterating liquor per se, as the law then stood sans amendments, would not attract the provision of section 328 of IPC unless there is positive evidence that A-1 administered the poisoned liquor directly or caused it to be taken by the deceased indirectly with necessary intent and mens rea. This view of the trial Judge as confirmed by the High

court does not appear to be sound in the backdrop of the death actually occurring. But since it has taken that view it cannot stop short of hurt and so must slip down to a fall downright. Important links in the prosecution case on this particular aspect remain otherwise missing. A-1 would thus have to be acquitted of the charge under section 328 IPC in carrying out the findings of the High Court to their logical end."

21. In Keshub Mahindra's case (supra), in para 20 of the reported decision, the Supreme Court has observed as under:

"Before any charge under Section 304 Part II can be framed, the material on record must at least prima facie show that the accused is guilty of culpable homicide and the act allegedly committed by him must amount to culpable homicide. In view of Section 299 IPC, the material relied upon by the

prosecution for framing a charge under Section 304 Part II must at least prima facie indicate that the accused had done an act which had caused death with at least such a knowledge that he was by such act likely to cause death. The entire material which the prosecution relied upon before the trial court for framing the charge cannot support such a charge unless it indicates prima facie that on that fateful night when the Plant was run at Bhopal it was run by the accused concerned with the knowledge that such running of the Plant was likely to cause death of human beings. Mere act of running a Plant as per the permission granted by the authorities would not be a criminal act. Even assuming that it was a defective Plant and it was dealing with a very toxic and hazardous substance like MIC the mere act of storing such a material by the accused in Tank could not even prima facie suggest that the accused concerned thereby had knowledge that they were likely to cause death of human beings.

In fairness to the prosecution it was not suggested and could not be suggested that the accused had an intention to kill any human being while operating the Plant. Taking the entire material on its face value and assuming it to represent the correct factual position in connection with the operation of the Plant at Bhopal on that fateful night it could not be said that the said material even prima facie called for framing of a charge against the accused concerned under section 304 Part II IPC on the specious plea that the said act of the accused amounted to culpable homicide only because the operation of the Plant on that night ultimately resulted in deaths of a number of human beings and cattle. When on the material produced by the prosecution no charge could be framed against any of the accused under Section 304 Part II there would remain no occasion to press in service the applicability of section 35 IPC in support of such a charge for those accused who were not actually concerned with

the running of the Plant at Bhopal, namely, accused 2, 3, 4 and 12.”

22. So far as the principles enunciated by the Supreme Court in the above referred to two judgments are concerned, there is no manner of doubt that to convict an accused for the offence punishable under section 304 Part II of IPC, there must be knowledge on the part of the accused that the act done by him would cause the death of the person he was likely to cause death. Both the aforesaid judgments relied upon by Mr. Buch rested on the facts of those cases. In both those cases there was no 'knowledge' on the part of the accused. The prosecution has not been able to prove by direct, reliable and cogent evidence that the accused administered poison, etc., himself or by means of another with necessary intent and mens rea. Therefore, both the judgments relied upon by Mr. Buch are of no avail or help to A-2 to canvass the proposition that at the relevant time A-2 had no knowledge that the

liquor was adulterated with methyl alcohol and the consumption thereof would cause serious injuries and may cause even death.

23. In the case of E.K. Chandrasenan v. State of Kerala, 1995 Cr.LJ 1445, in para 26 of the reported judgment, the Supreme Court has observed as under:

> "To sustain the first submission, Shri Sanyal refers us to the definition of "voluntarily" as given in Section 39 of the Penal Code which, inter alia, says that a person is said to cause an effect voluntarily when he knew or had reason to believe to be likely to cause it. Learned counsel contends that the accused persons had no knowledge that the effect of the consumption of the adulterated liquor would be so injurious as it proved to be. This submission cannot be accepted because the aforesaid knowledge can well be imputed for two reasons. First, under the

Kerala Abkari Act no mixture at all with the liquor as supplied to the firm was permissible. This legal position is not disputed before us. In view of this, the acceptance of the formula given by A-9 in mixing “spirit” or water with arrack was itself an illegal act. Secondly, in the present case what was mixed was not “spirit” but, as already noted, poisonous substance, as is methyl alcohol. The percentage of methyl found in the liquor supplied by the firm being what was found to be, it has to be held that the persons responsible for mixing had the knowledge that consumption of the liquor as likely to cause very serious adverse effects. The contention that all the consumers were not adversely affected cannot water down the mens rea required to bring home the guilt under section 326.”

24. Applying the principles laid down by the Supreme Court in the above referred to judgment

to the facts of the present case, there is evidence to connect the A-2 for selling liquor adulterated with methyl alcohol, which is a poisonous substance, and therefore, he had the knowledge that after consumption of the liquor containing methyl alcohol, the persons who consume it would receive serious injuries and such injures can become fatal too. There is evidence to the effect that the victims have purchased the liquor containing methyl alcohol from A-2 or from some other accused to whom A-2 had supplied the liquor. Therefore, the contention that A-2 had 'no knowledge' that the liquor contained methyl alcohol, which is a poisonous substance, has no substance and it has to be ruled that A-2 had 'knowledge' that the liquor was containing methyl alcohol and on consuming it the person who consumes it will receive serious injuries or fatal injuries.

25. In aforesaid view of th matter, according to this Court, conviction of A-2 for offences

punishable under Sections 324 Part II, 328 and 326 of IPC is based on evidence on record, in the nature of dying declarations of the victims as well as evidence of the injured persons and, therefore, the impugned judgment and order of conviction for the offences with which he was charged has to be confirmed and maintained.

26. So far as A-8 is concerned, there is evidence to the effect that 12 litres of liquor alcohol adulterated with methyl alcohol was recovered from his house in the presence of panch witnesses and there is also evidence to the effect that he had sold the liquor to some of the victims. It is true that panch witnesses to the panchnama have not supported the prospection case but that fact itself is not enough to discard the prosecution case.

27. It is well settled that merely because the panch witnesses do not support the case of the prosecution, the case of the prosecution need not

be thrown over-board as unreliable. It may be realized that the phenomenon of panch witnesses turning hostile to the prosecution is not unknown and is ever on the increase. It needs hardly to be emphasized that the decision of a case does not depend solely on the question whether the panch witnesses support the prosecution or turn their back on it. If the decision of the case were to depend solely on the testimony of panch witnesses regardless of the evidence of police officers, in theory, it would be giving a right to veto to the panchas so far as the question of culpability of an accused is concerned, which is not permissible in criminal jurisprudence. It is well settled that without good ground being pointed out, testimony of police officer, if otherwise found to be true and dependable, cannot be discarded by court on the ground that he is a police officer. On the facts and in the circumstances of the case, this Court finds that testimonies of police officers and other witnesses are not only inspiring confidence, but, get corroboration from the other evidence on

record and from the evidence of the police officers, the contents of the panchnama have been proved and it is given exhibit number as well. Therefore, according to this Court, the said panchnama can be relied upon to decide the complicity of the accused. Therefore, there is no reason to discard the evidence of the police officers as well as other witnesses. According to this Court, therefore, the prosecution has successfully established the case against A-8 for commission of offences punishable under Sections 65 (e) and 66 (1) (b) of the Prohibition Act.

28. On close scrutiny of the evidence on record, we find no infirmities in the findings, ultimate conclusion and the resultant order of conviction recorded by the trial court. We are in complete agreement with the said findings, ultimate conclusion and resultant order of conviction passed by the trial court, as according to us, no other conclusion is possible except the one reached by the trial court in the facts and circumstances of the case.

29. After having held that the conviction recorded against both the accused has to be confirmed and maintained, the next question which calls for determination of this court is as to what sentence should be imposed upon them.

30. So far as A-2 is concerned, he has been convicted for the offences punishable under Sections 304 Part II, 328 and 326 of IPC and the trial court has imposed the maximum sentence of RI for ten years and fine of Rs.6,000/- for the offence punishable under section 304 Part II of IPC, sentence of RI for seven years and fine of Rs.5,000/- for the offence punishable under Section 328 of IPC, sentence of RI for seven years and fine of Rs.5,000/- for the offence punishable under Section 326 of IPC.

31. It is true that the incident had taken place on 19.3.1990 prior to 16 years. A-2 has undergone sentence of four months during trial after and after pronouncement of the judgment and

order on 26.3.2004, he is undergoing sentence till date. The total conviction undergone by A-2, including pre-conviction and post-conviction is around 3 years and he has paid fine amount of Rs.22,000/- as stated by Mr. Buch, learned advocate of A-2.

32. So far as the mitigating circumstances in his favour are concerned, Mr. Buch has contended that there are no antecedents, no other offence much less any offence under the Prohibition Act has been lodged against him. Even prior to the present incident and subsequent to the present incident as well as even during the period when A-2 was on bail, no such offence has even taken place. A-2 is living a peaceful life and settled in a new vocation of garment business. Besides this he has to shoulder the responsibility of his wife and seven children, two of them are married and two daughters and three sons are of marriageable age. He was aged about 37 years at the time of the incident and now he is 53 years

old and is also suffering from various illness like blood pressure, hyper-tension, diabetes, and some difficulties of prostate.

33. So far as A-8 is concerned, the mitigating circumstances in his favour pointed out by Mr. Buch are that during trial he was on bail and even today he is on bail and the incident in question he has not indulged in any such activities. He is the sole earning member of the family and he earns livelihood by plying rickshaw. He has been convicted for offence punishable under section 65 (e) and 66 (1) (b) of the Prohibition Act.

34. So far as offence punishable under section 304 Part II of IPC is concerned, the Supreme Court in catena of decisions has imposed sentence varying from 4 to 5 years. In instant case the trial court has imposed the maximum sentence of RI for ten years on A-2. Therefore, according to us, the said sentence is required to be altered

to 5 years instead of ten years.

35. In aforesaid state of affairs, according to us, long period that has rolled by since the committing of the offence in question and the mitigating circumstances which have been high-lighted in the foregoing paragraphs, both the accused deserve sympathetic consideration and in the present case the sentences imposed upon them are required to be altered while maintaining the conviction.

36. Therefore, we are of the opinion that the appeals filed by both A-2 and A-8 deserve to be partly allowed qua sentence only and the judgment and order convicting both the accused for various offences is required to be confirmed and maintained. So far as sentence is concerned, the same deserves to be altered as per the final order.

37. For the forgoing reasons, the appeals succeed

in part and accordingly they are partly allowed. So far as A-2 is concerned, while maintaining the order of conviction for commission of offence punishable under Sections 304 Part II, 328 and 326 of IPC is concerned, he is sentenced to suffer RI for 5 years and fine of Rs.30,000 i.d., RI for further three months for offence punishable under section 304 Part II of IPC, RI for 5 years and fine of Rs.10,000/- i.d., RI for further 3 months for commission of the offence punishable under Section 328 of IPC and he is also sentenced to suffer RI for 5 years and fine of Rs.10,000/- i.d., RI for further 3 months for commission of the offence punishable under Section 326 of IPC.

He is also sentenced to suffer S.I. for 1 year and fine of Rs.10,000 i.d., SI for further 3 months for the offence punishable under section 65 (e) of the Prohibition Act and also sentenced to suffer SI for 3 months and fine of Rs.5,000 i.d., SI for further one month for offence punishable under section 66 (1) (b) of the Prohibition Act.

It is also ordered that all the sentences shall run concurrently. The fine amount of Rs.22,000/- paid by him, as reported by Mr. Buch, learned advocate of A-2, shall be adjusted against the fine imposed on him by this court. He shall also be given set off of the period of sentence already undergone.

So far as A-8 is concerned, while maintaining the conviction for commission of the offences punishable under sections 65 (e) and 66 (1) (b) of the Prohibition Act, he is sentenced to suffer SI for 1 year and fine of Rs.10,000/- i.d., SI for further 3 months for the offence punishable under section 65 (e) of the Prohibition Act and he is also sentenced to suffer SI for 3 months and fine of Rs.5,000/- i.d., SI for further one month for the commission of the offence punishable under section 66 (1) (b) of the Prohibition Act.

Both the sentences imposed on A-8 shall also run concurrently. The amount of fine, if any paid by him, shall be adjusted. He shall be given set off of the period of imprisonment already undergone by him.

A-8 is on bail. Therefore, his bail bonds shall stand cancelled and surety is discharged. Therefore he is directed to surrender to jail authorities immediately to serve out the remaining period of sentence. If he fails to surrender before the jail authorities forthwith, the jail authorities shall take necessary action for arresting him and to bring him to jail to serve out the remaining period of sentence.

In this manner, both these two appeals are disposed of.

(A.M. Kapadia, J.)

(K.A. Puj, J.)

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(karan)